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MEMORANDUM

SUPREME COURT : QUEENS COUNTY TSP
 By: MARTIN J. SCHULMAN, J.S.C.

STUART FELDMAN, CLARA FELDMAN
 and JEROME FELDMAN,

INDEX NO.: 16570/2006

Plaintiffs,

MOTION DATE: 9/6/11

- against -

SEQ. NO.: 3

THE CRYDER HOUSE, INC.,

DATED: 11/16/11

Defendant.

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This motion and cross-motion which seek an order confirming in part, and rejecting in part, the Report of Judicial Hearing Officer James P. Dollard dated March 30, 2011 is decided as follows:

Plaintiff Stuart Feldman is the owner and proprietary lessee of a residential cooperative apartment located at 166-25 Powells Cove Boulevard, Apartment #16 F, Queens, New York (apartment). His parents, co-plaintiffs Clara Feldman and Jerome Feldman, have resided in the apartment since his purchase of the apartment for their use in 1997. Three years after plaintiffs Clara and Jerome Feldman moved into the apartment, they installed an air conditioner in the apartment through an opening they created in an interior wall of the apartment to the exterior brick wall of the building.

Defendant The Cryder House, Inc. (the Co-op), a cooperative corporation which owns and operates the apartment building, came to learn of the existence of the air conditioner in plaintiffs' apartment, and sent plaintiff Stuart Feldman a notice dated March 20, 2006, stating, among other things, that he had breached the proprietary lease, and was in violation of the house rules, in that he had failed to remove the air conditioner which extended and protruded from the wall of the building. The notice also stated that in the event he did not cure the breach and violation by April 20, 2006, or vacate the premises by that date, the Co-op would terminate his tenancy five days thereafter, and seek a judgment of ownership

and possession of the apartment, and for an award of all sums due and owing.

In response, plaintiffs commenced this action, alleging that plaintiff Clara Feldman suffers from a disability in that she suffers from an extremely allergic health problem, requiring her to have purified air, and necessitating the use of an air conditioner. They also allege that absent the air conditioner, plaintiff Clara Feldman has difficulty breathing and engaging in the activities of daily living. Plaintiffs further allege that defendant Co-op has violated the federal Fair Housing Amendments Act of 1988 (FHAA) (42 USC § 3601 *et seq.*)¹ and committed an unfair housing practice by discriminating against her on the basis of her physical impairment, and by proposing to evict her based upon her physical impairment. Plaintiffs additionally allege that by threatening eviction, defendant Co-op is depriving them of their quiet enjoyment of the premises. They seek a declaration that the use of the air conditioner is not a violation of the house rules, or alternatively, constitutes a de minimus violation thereof and is excusable by virtue of the medical needs of plaintiff Clara Feldman and may not constitute a basis for eviction. They further seek an award of damages, and reasonable attorneys' fees pursuant to 42 USC § 3613(c)(2) and a permanent injunction enjoining defendant Co-op from ousting plaintiffs from possession of the apartment or evicting them on the basis of the presence of the air conditioner in the apartment. Plaintiffs obtained a preliminary injunction).

Defendant Co-op served an answer with affirmative defenses and counterclaims for mandatory injunction to compel the removal of the air conditioner and to restore the premises to the original condition, for damages to property and trespass and damages based upon exclusion from the apartment and unauthorized improvement, and for an award of costs and disbursements, including attorneys' fees. Defendant Co-op claims that plaintiffs never obtained its written consent to install the air conditioner, such installation breached the proprietary lease and violated the house rules, and that plaintiffs' failure to cure the violation and continued occupancy of the apartment is violative of the proprietary lease.

Plaintiffs served a reply with various affirmative defenses, including defenses based upon violation of the FHAA, the New York State Human Rights Law (Executive Law Article

¹The [Fair Housing Act] [FHA], enacted in 1968, originally prohibited discrimination on the basis of race, color, religion, or national origin. *City of Edmonds v Oxford House, Inc.*, 514 US 725, 728 n 1 (1995). In 1988, Congress enacted the Fair Housing Amendments Act ("FHAA") which extended the FHA's coverage to individuals with disabilities, making it unlawful to 'discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services of facilities in connection with such dwelling, because of a handicap of that person.' 42 USC § 3604(f)(2)(A)'' (*Taylor v Harbour Pointe Homeowners Assn.*, 2011 WL 673903 WD NY 2011.

15), and the New York City Human Rights Law (New York City Administrative Code § 8-101, *et seq.*).

Following the completion of discovery and filing of the note of issue, the issues raised in this action were referred to Judicial Hearing Officer James P. Dollard (JHO), to hear and report (*see* order dated September 16, 2009). The JHO conducted an evidentiary hearing over several days, during which the parties and other witnesses, including expert witnesses, testified. The JHO granted the parties an opportunity to submit post-hearing submissions, and on March 31, 2011, following receipt of such submissions, the JHO filed his report dated March 30, 2011.

Plaintiffs move to confirm in part, and to reject in part, the report of the JHO, and to award them costs and disbursements, including attorneys' fees. Defendant Co-op cross-moves to confirm in part, and to disaffirm in part, the report of the JHO, and to dismiss any and all claims asserted by plaintiffs for an award of attorneys' fees.

The JHO made the following findings of fact:

The senior Feldmans have resided in the premises for over ten years and installed the air conditioner through the brick wall in such a manner that it protrudes slightly over a terrace, which is part of the leased premises. The installation of the air conditioner was without the permission of the Co-op's board. The proprietary lease specifically provides that "lessee shall not, without first obtaining the written consent of lessor which shall not be unreasonably withheld," make any alterations, etc.² There are specific house rules regarding air conditioning, construction or additions on a terrace and procedures and technical requirements to be observed before and during any work performed, but plaintiffs did not comply with these requirements. Defendant Co-op, however, failed to present evidence that these violations caused any substantial damage or losses to the building or its other residents, other than an opening in the wall for the air conditioner, or that the air conditioner was visible or audible to other residents. Defendant Co-op also failed to present evidence that any residents had complained to the board (regarding the air conditioner). The opening in the wall apparently can be easily restored at such time when the air conditioner is removed.

Plaintiff Clara Feldman is 86 years old and has a physical impairment which substantially limits her life activities absent the availability of the air conditioner. Plaintiff Clara Feldman suffers from asthma, severe chronic allergies to dust, pollen and air borne

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The JHO noted that "[i]t might well be argued that had a proper request to the board been made before installation, accompanied by Clara's medical history that it would have been unreasonable for the board to withhold such permission" (*see* p 4 of the JHO's report).

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allergens, manifested by severe headaches, coughing, sneezing difficulty breathing and pain.³ Plaintiffs installed the air conditioner to alleviate these problems, and these problems are alleviated when Clara Feldman sleeps, and spends a good part of the day in a chair, near it. The building contains a central heating and cooling system, which provides heating or cooling depending on the season. Apartment unit occupants have no control over whether they will have heat or hot water. The system uses machinery in the basement to heat or cool water, which is then delivered through pipes to floor-mounted, heating and cooling "units" in all apartments in the building at the same time. The Feldmans' apartment has six such "units," but none of them are located near where the air conditioner was installed by plaintiffs. The type of filtration used in the heating and cooling units is insufficient to provide the type of filtration provided by the air conditioner installed by plaintiffs, which use improves Clara Feldman's medical condition and is medically necessary for her to enjoy the use of her residence.

The JHO concluded that The Federal Fair Housing Act (FHA)⁴ applies to this case, and defendant Co-op's service of the notice to cure and continued defense of the lawsuit constitute discriminatory acts "because of Mrs. Feldman's handicap both by refusing permission to maintain the air conditioner and by refusing to make reasonable accommodations in it's [sic] rules, policies and practices when such accommodations are necessary to afford her equal opportunity to use and enjoy her dwelling (42 USC 3604[f][3])." Defendant Co-op's failure to permit the continued use of the air conditioner constitutes an unlawful discriminatory practice pursuant to Executive Law § 296 and the New York City Human Rights Law. The actions of the Co-op are not protected by a rule analogous to the "business judgment rule,"⁵ because an action taken, a decision made,

³ The JHO referred to the testimony of Dr. Morton Teich, a physician who is board-certified in allergy and immunology, as showing that plaintiff Clara Feldman is allergic to dust, feathers, cotton lint, dust mites and mold, "which induced a reaction including local skin reaction, nausea, burning sensation, itchy throat, dry cough and generalized malaise," and Dr. Teich's opinion that she was extremely allergic, hyper-reactive and had delayed reactions "which would last for two or three days" (see p 3 of the JHO's report).

⁴ see n 1.

⁵ "The business judgment rule is a common-law doctrine by which courts exercise restraint and defer to good faith decisions made by boards of directors in business settings" (40 W. 67th St. Corp. v Pullman, NY2d 147, 153 [2003]). The rule has been long recognized in New York, and has been applied in the context of residential cooperative corporations (*id.*; see *Matter of Levaradusky*

or a rule enforced, in violation of these anti-discrimination statutes are not lawful or legitimate. Real Property Law § 234 (which provides for reciprocal rights for attorneys' fees under certain circumstances), is inapplicable to this case.

The JHO recommended that Plaintiffs should be granted a judgment (1) declaring that (a) plaintiff Clara Feldman has a physical impairment which substantially limits her life activities, (b) it is a medical necessity for her to have an air conditioner separate and apart from the units furnished by the building, (c) the rules, policies and practices of defendant Co-op as applied to plaintiff Clara Feldman constitute violations of the FHAA, the Executive Law and the New York City Human Rights Law, and are not enforceable as to her, and as long as she resides in the apartment, the present air conditioner or a replacement thereof may be maintained through the wall in the same location as at present, and (d) in the event plaintiff Clara Feldman permanently ceases to reside at the apartment, plaintiffs reimburse defendant Co-op for the reasonable costs of removing the air conditioner and restoring the wall to its original condition; (2) enjoining defendant Co-op from taking any adverse action interfering with the maintenance or operation of the air conditioner or a replacement thereof at the same location and of the same size until Clara Feldman permanently ceases to reside there; (3) dismissing the affirmative defenses and counterclaims asserted by defendant Co-op.; and (4) plaintiffs should not be awarded punitive damages or attorneys' fees.

Plaintiffs move, in effect, (1) to confirm the JHO's report except for that portion which recommended that their claim pursuant to Real Property Law § 234 for an award of counsel fees be denied, and (2) for an award of costs and disbursements, including attorneys' fees.

Defendant Co-op opposes the motion by plaintiffs on the ground that it is untimely served, and cross-moves to confirm the JHO's report only to the extent that the report recommends that an award of counsel fees be denied to plaintiffs, and to disaffirm that portion of the report which finds defendant Co-op discriminated against plaintiffs and recommends that its counterclaim for attorneys' fees be denied. Defendant Co-op argues that the JHO erred in finding that plaintiff Clara Feldman has a disabling condition. Defendant Co-op also argues that the JHO erred in concluding that it violated the federal FHA, since plaintiffs failed to establish a prima facie case with respect to their discrimination claim. It contends that plaintiffs failed to show (1) the use of the "through-the-wall" air conditioner is medically necessary to avoid the negative effects of Clara Feldman's alleged disability, and (2) they asked for, and were refused, a reasonable accommodation, or defendant Co-op was aware of plaintiff Clara Feldman's alleged disability but nevertheless made no accommodation. Defendant Co-op also contends that the JHO erred in concluding the

v One Fifth Ave. Apt. Corp., 75 NY2d 530, 535 [1990].

Co-op's decisions to require plaintiffs to remove the air conditioner and seek termination of the proprietary lease, are not protected from judicial inquiry by the business judgment rule. Defendant Co-op further contends, in essence, that the JHO erred in concluding that its counterclaim for an award of attorneys' fees be dismissed.

Plaintiffs oppose the cross-motion.

To the extent defendant Co-op asserts that plaintiffs' motion should not be considered since it was made after the expiration of the 15-day time period contained in CPLR § 4403 and 22 NYCRR 202.44, the court notes that defendant Co-op itself also failed to move in relation to the JHO's report within the 15-day time period. The failure to move within the 15-day time period, however, is not fatal to the court's inherent power to either confirm all or confirm part, or otherwise act with respect to a report of a referee (*see, Matter of Breland v MVAIC, Corp.*, 24 AD2d 881 [1965]; *Matter of Dissolution of Gift Pax, Inc.*, 123 Misc 2d 830 [1984]). In addition, plaintiffs' delay in making the motion was relatively short. As a consequence, the court shall consider the merits of the arguments raised by the parties, relative to whether any part of the report of the JHO should be confirmed, and whether plaintiffs may seek an award of costs and disbursements, including attorneys' fees.

Plaintiffs argue that the JHO erred in concluding they are not entitled to attorneys' fees under Real Property Law § 234 because that statute is inapplicable under the circumstances of the case. They argue they are entitled to legal fees pursuant to Real Property Law § 234, insofar as they brought the action to prevent defendant Co-op from unlawfully evicting them and force it to comply with applicable anti-discrimination laws. Plaintiffs also argue they are entitled to an award of attorneys' fees as the "prevailing party" pursuant to the FHAA (42 USC § 3613[c](2)), Executive Law § 297(10), and New York City Administrative Code § 8-502(f).

Defendant Co-op argues that the JHO erred in finding that plaintiff Clara Feldman has a disabling condition, and the use of the air conditioner is medically necessary to alleviate, or avoid, the negative effects of her alleged disability. Defendant Co-op also argues that the JHO erred in concluding that it violated the federal FHA. According to defendant Co-op, plaintiffs failed to establish a prima facie case with respect to their discrimination claim because they made no showing they asked for, and were refused, a reasonable accommodation, or defendant Co-op was aware of plaintiff Clara Feldman's alleged disability but nevertheless made no accommodation. Defendant Co-op contends that the JHO erred in concluding that the Co-op's decisions to require plaintiffs to remove the air conditioner and seek termination of the proprietary lease, are not protected from judicial inquiry by the business judgment rule. Defendant Co-op further contends, in essence, that the JHO erred in concluding its counterclaim for an award of attorneys' fees be dismissed.

It is well settled that the report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility (see *Royal & Sun Alliance v. New York Cent. Mut. Ins. Co.*, 29 AD3d 886 [2006]; see also *Zupa v. Kefit*, 84 AD3d 792 [2011]; *Kaplan v. Einy*, 209 AD2d 248 [1994]; *United States Trust Company of New York v. Olsen*, 194 AD2d 481 [1993]). The court, however, may reject any portions of the report that are unsupported by the record and may do so upon its own independent review (see, *Borenstein v. Rochel Properties, Inc.*, 216 AD2d 34 [1995]).

The factual findings of JHO Dollard are substantially supported by the record, and he clearly defined the issues and resolved matters of credibility (see *Matter of Smiros v. Lopez*, 251 AD2d 587 [1998]; *Stone v. Stone*, 229 AD2d 388 [1996]; *Frater v. Lavine*, 229 AD2d 564 [1996]; *Kaplan v. Einy*, 209 AD2d 248 [1994]; *Tai Wins Hong Importers v. Kins Realty Corp.*, 208 AD2d 710, 711 [1994]; *United States Trust Co. v. Olsen*, 194 AD2d 481 [1993]). There is sufficient evidence in the record that 1) plaintiff Clara Feldman suffers from a physical impairment that substantially limits her major life activities absent the availability of the air conditioner; 2) the board accepted informal, oral communication; and 3) at least one board member (who resided on the same floor as the senior Feldmans), had been informed of Clara Feldman's medical condition and need of the use of an air conditioner in addition to the air conditioning supplied by the building's heating and cooling system. The JHO also properly concluded that the refusal to permit plaintiff Clara Feldman to maintain the air conditioner, the service of the notice to cure, and the continued defense of the action, constituted unlawful discriminatory acts, and under such circumstances, the Co-op's determinations are not protected from judicial inquiry under the business judgment rule (see generally *Pelton v. 77 Park Ave. Condominium*, 38 AD3d 1 [2006]; cf. *Jones v. Surrey Cooperative Apartments*, 263 AD2d 33 [1999] [board action upheld in the absence of bad faith or discrimination]).

To the extent the JHO concluded plaintiffs are not entitled to attorneys' fees pursuant to Real Property Law § 234 under the circumstances presented, he was correct. Plaintiffs made no claim for attorneys' fees pursuant to Real Property Law § 234 in their complaint. Although plaintiffs successfully defended against defendant Co-op's fourth counterclaim for ejectment (see, e.g., *Kuttas v. Condon*, 290 AD2d 492 [2002]), a tenant's entitlement under Real Property Law § 234 to recover attorney's fees is "reciprocal" to the landlord's entitlement to recover its fees under the lease (see, *Solow Mgt. Corp. v. Tanger*, 19 AD3d 225 [2005]; see, also, *Hamilton v. Menalton Realty, LLC*, 14 Misc 3d 13 [2006]). The proprietary lease herein contains language requiring the lessee to reimburse the lessor for "ITS LEGAL EXPENSES AND DISBURSEMENTS," "IN THE EVENT OF ANY DEFAULT HEREUNDER BY LESSEE OR ANY LITIGATION BETWEEN LESSEE AND

LESSOR ... IN CONNECTION WITH THIS LEASE..." (see Defendant Co-op's Exhibit "A" in evidence [Proprietary Lease § 37], p 20). Such language, however, does not expressly provide for recovery of attorneys' fees by the lessor (see *Waverly Mews Corp. v Waverly Stores Assoc.*, 294 AD2d 130 [1st Dept 2002] [legal fees denied where lease provided that the landlord was entitled to all costs and expenses incurred in the event of the defendant's default of obligations]), and plaintiffs have failed to cite to any other provision in the proprietary lease to establish that defendant Co-op is entitled to reimbursement of attorneys' fees. Because plaintiffs have failed to demonstrate defendant Co-op has a right to recover attorney's fees from the lessee pursuant to the proprietary lease, the reciprocal entitlement afforded by Real Property Law § 234 is not triggered, and plaintiffs do not have any right to recover attorneys' fees from the Co-op pursuant to such statute (see *Hamilton v Menalton Realty, LLC*, 14 Misc 3d 13 [App Term, 2d & 11th Jud Dists [2006]).

That branch of the motion by plaintiffs which seeks to disaffirm the portion of the JHO's report relative to the applicability of Real Property Law § 234 is denied. That branch of the motion by plaintiffs which seeks to confirm the remainder of the JHO's report is granted. The cross-motion by defendant Co-op is granted only to the extent of confirming that part of the JHO's report recommending that an award of counsel fees pursuant to Real Property Law § 234 be denied to plaintiffs.

With respect to that branch of the motion by plaintiffs for an award of attorneys' fees pursuant to Executive Law § 297(10), New York City Administrative Code § 8-502(f) and 42 USC § 3613, plaintiffs asserted entitlement to an award of attorneys' fees pursuant to those statutes in their post-trial memorandum. Inasmuch as the JHO failed to report on whether they were entitled to attorneys' fees pursuant to those statutes, the court shall determine the issue.

"The New York State Human Rights Law provides for an attorney's fee only in cases alleging housing discrimination (see Executive Law § 297[10])" (*Jattan v Queens Coll. of City Univ. of N.Y.*, 64 AD3d 540 [2009]). Executive Law § 297(10), however, provides that:

"With respect to cases of housing discrimination only, in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court may in its discretion award reasonable attorney's fees to any prevailing or substantially prevailing party; provided, however, that a prevailing respondent or defendant in order to recover such reasonable attorney's fees must make a motion requesting such fees and show that the action or proceeding brought was frivolous; and further provided that in a proceeding brought in the division of human rights, the commissioner may only award attorney's fees as part of a final order after a public hearing held pursuant to subdivision four of this section. In no case shall attorney's fees be awarded to the division, nor shall the

division be liable to a prevailing or substantially prevailing party for attorney's fees, except in a case in which the division is a party to the action or the proceeding in the division's capacity as an employer. In order to find the action or proceeding to be frivolous, the court or the commissioner must find in writing one or more of the following:

- (a) the action or proceeding was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another; or
- (b) the action or proceeding was commenced or continued in bad faith without any reasonable basis and could not be supported by a good faith argument for an extension, modification or reversal of existing law. If the action or proceeding was promptly discontinued when the party or attorney learned or should have learned that the action or proceeding lacked such a reasonable basis, the court may find that the party or the attorney did not act in bad faith."

Plaintiffs made no claim pursuant to Executive Law § 297 or § 298 in their complaint, and raised the violation of Executive Law article 15 only as an affirmative defense in reply to the counterclaims. Thus, because this action was not commenced under Executive Law § 287 or § 298, and because the New York State Human Rights Law does not otherwise provide for an award of attorney's fees, plaintiffs are not entitled to an award of attorneys' fees pursuant to Executive Law § 297(10).

Section 8-502(f) of the New York City Administrative Code provides that "[i]n any civil action commenced pursuant to this section, the court, in its discretion, may award the prevailing party costs and reasonable attorney's fees." However, because plaintiffs did not commence this action pursuant to the New York City Human Rights Law, but rather only raised violation of the statute as an affirmative defense, an award of attorneys' fees under section 8-502(f) likewise is unavailable to them.

To the extent plaintiffs seek an award of attorneys' fees pursuant to 42 USC § 3613(c)(2), that section provides "[i]n a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." "The question of whether plaintiff is a 'prevailing party' within the meaning of the fee-shifting statutes is a threshold question" (*LeBlanc-Sternberg v Fletcher*, 143 F3d 748, 757 [2d Cir 1998]). The United States Supreme Court has held that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff" (*Farrar v Hobby*, 506 US 103, 111-112 [1992]). A plaintiff who is awarded no damages, or only nominal damages, but obtains an injunction against a defendant based upon a violation under the FHAA, may be said to have

prevalled (see *LeBlanc-Sternberg v Fletcher*, 143 F3d 748 [2d Cir 1998]; *Ragin v Harry Macklowe Real Estate Co.*, 870 F Supp 510 [SD NY 1994], *mod. on other grounds* 6 F3d 898 [2d Cir 1993]).

In this case, plaintiffs are entitled to a judgment against defendant Co-op providing declaratory and injunctive relief and dismissal of the affirmative defenses and counterclaims asserted by defendant Co-op, in accordance with the JHO's recommendations. Consequently, plaintiffs are the prevailing parties within the meaning of the FHAA, and in an exercise of discretion, may be awarded reasonable attorneys' fees. Generally, in awarding attorneys' fees under federal civil rights fee-shifting statutes, courts are directed to use the lodestar method, whereby a court multiplies the number of hours reasonably expended by a reasonable hourly rate to arrive at a reasonable attorneys' fee award (see *Blanchard v Bergeron*, 489 US 87 [1989]; 1989; *Ragin v Harry Macklowe Real Estate Co.*, 870 F Supp 510 [SD NY 1994], *mod. on other grounds* 6 F3d 898 [2d Cir 1993]; see also *McGrath v Toys "R" Us, Inc.*, 3 NY3d 421 [2004]).

Accordingly, plaintiffs' counsel is directed to submit, in connection with the submitted order and judgment, an affirmation setting forth the legal services rendered, and the hours expended for the work described.

Submit Order and Judgment.



J.S.C.

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